No. 12900

United States Court of Appeals

For the Ninth Circuit

J. ELROY MCCAW & JOHN D. KEATING, *Appellants*,

— VS. —

TORKEL WESTLY, THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF OF APPELLANTS

KENNETH DAVIS,
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THE ARGUS PRESS, SEATTLE

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JURISDICTIONAL STATEMENT

DISTRICT COURT:

The jurisdiction of the District Court was established "on a variety of grounds" (Tr. 467); the subject matter involves an act of Congress (Federal Communications Act, Title 47, U.S.C.A.); and a Federal question was clearly shown under Section 1331, Title 28, U.S.C.A.; diversity of citizenship was established under Section 1332, U.S.C.A. (Tr. 3, 4, 5); the amount in controversy exceeded $3,000.00 (Tr. 6); and an act of Congress regulating commerce is involved under Section 1337, Title 28, U.S.C.A.; and a declaratory judgment is requested under Section 2201, Title 28, U.S.C.A. (Tr. 22, 27).

The District Court found (Tr. 467):

> "I am well satisfied that of the cause stated in the complaint this Federal Court has jurisdiction on a variety of grounds: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations."

CIRCUIT COURT:

Final judgment was entered February 5, 1951 (Tr. 159). Notice of appeal was timely entered (Tr. 164). This court has jurisdiction of this appeal from said final decision of the said court by virtue of Section 1294, Title 28, U.S.C.A.

STATEMENT OF THE CASE

Appellant McCaw is a citizen and resident of Centralia, Washington, and Appellant Keating is a citizen and resident of Portland, Oregon. In 1946 appellants obtained a license for a limited term from the Federal Communications Commission (See Complaint, Tr. 3 to 30), to operate a radio station in Honolulu, Territory of Hawaii. The conditions precedent to such a grant are set forth in the Complaint (Tr. 7 to 29), and such conditions precedent are so many and varied (including financial, technical, and character qualifications), and the regulations of the Federal Communications Commission are so sensitive, that the states and territories cannot concern themselves in any way whatsoever with the subject matter of radio broadcasting because of the pre-emption of such subject matter by Congress (Tr. 24). Appellants invested a large sum of money to erect and operate Station KPOA, having 5,000 kilowats power, and are now affiliated with the Mutual Broadcasting System, a national network. A license for a limited period (three years) was granted appellants and unless they operate their station within the rigid controls and regulations as propounded by Congress (Title 47, U.S.C.A.) they will lose their entire investment; notwithstanding this complete pre-emption by Congress of this subject matter, the Territory of Hawaii proceeded to classify radio broadcasting with theatres, opera houses, amusements, dance halls, vaudeville, skating rinks (Tr. 6) and placed a tax thereon of two and one-half per cent of their gross income (Tr. 7). No suit was pending at the time of the institution of this action in

any of the courts or agencies of the Territory between the parties involving the subject matter of this litigation. Decisions of the Supreme Court of the U.S. and of this Circuit had heretofore deterred the Territory from attempting to enforce this illegal tax (Tr. 23, 26) and plaintiffs had made their investment in the light of and depending upon these prior decisions of competent courts that they were engaged in a national uniform system of a most sensitive form of commerce, in which a state or territory could have no part without permission being first had of Congress (Tr. 22, 24, 26). The territory had not sued, as aforesaid, the plaintiffs, and in spite of prior decisions of the Supreme Court of the U.S. and of a Three-Judge Federal Court in this Circuit, the Territory engaged in a running fire of correspondence with appellants threatening to collect the tax in spite of these decisions adverse to their contention. Appellants advised appellee the law was illegal and constituted a burden upon a form of commerce which had been pre-empted by the Congress to the exclusion of any concern over the subject matter by the states and territories. Since no other suit was pending, appellants secured the consent of appellee to withhold any action until appellants sought a declaration under Section 2201, Title 28, U.S.C.A. (Tr. 264). The parties cannot confer jurisdiction on a court, but their subsequent desires cannot take it away, either, *once it attaches.* Therefore, appellants sued the Tax Commissioner as an individual, asking for both injunction and declaratory relief, and did not bring a suit against the Territory as such. As aforesaid, there was no suit pending be-

tween these parties in any Territorial court involving the subject matter of this litigation, so the rules of comity prevailing between Federal Courts and States Courts would not inveigh against federal jurisdiction in this case, nor could the rule of discretionary abstention overrule the plain duty of the trial judge to hear a justiciable controversy. The first suit between these parties was in the U.S. District Court.

Appellants alleged they had no adequate, speedy, and efficient remedy in the Territorial Courts and that they could not recover the penalties which exceeded $3,000.00 under any circumstances in the Territorial Courts, for penalties are expressly not returnable under Hawaiian law, even though the tax might be returned (Tr. 321, 323—see Post). Appellants contended, therefore, that their litigation should not be conducted piecemeal and that jurisdiction attached for the entire controversy and not just for a portion (i.e., for penalties alone). And, in view of the further facts that diversity of citizenship was present, and the Federal Communications Commission rules and regulations were so rigid and sensitive in their control of plaintiff's business (Read Complaint, Tr. 3 to 30), only the Federal Courts had jurisdiction of this action on a Federal right.

The Territory agreed to this suit in the Federal Court:

> "THE COURT: Well, of course, right here, speaking of practical effects, the spirit of the Territory to delay any of its remedies against the taxpayer because the taxpayer had said he wanted it in this Court has already had the practical effect of enjoining or restraining you folks

from collecting your tax. So the very thing that you are complaining about by agreement you have been willing to do.

"MISS LEWIS: No, your Honor, we have not been willing to do it, except for the purpose of allowing this question to be got out of the way. In other words, inevitably, since Mr. Davis was determined to get into federal court, the question was going to come up.

THE COURT: But you could have brought him into the Territorial court faster than he could have gotten into this Court, but you don't because you were willing to let him come into this Court first.

MISS LEWIS: Well, the exact statement made was that we were going to object to this federal equity jurisdiction and that Mr. Davis was told that. In other words, we did not bring our suits first—I'd like to put it this way—these are the facts and I have the correspondence * * *." (Tr. 290)

"THE COURT: By being at least courteous, shall we say, in practical effect the Territory has been restrained by a declaration of intention to come into the Federal Court to ask for relief at the hands of the Federal Government. So that by arrangement of the attorneys the spirit of the Johnson Act has been defeated. Now, I say, I don't place much weight on it, but I just happen to see it as you pass by." (Tr. 292)

"MISS LEWIS: If the Court had previously had this question up, that courtesy would not have been extended, but I do feel that Mr. Davis' point about federal court jurisdiction was bound to be determined, and we simply say a lot of wasted motions will be saved. I think the Court is right,

that it is true that in order to meet Mr. Davis' request we have temporarily withheld our suit. That is true.

THE COURT: In other words, even though in your opinion, Mr. Davis may not have a claim for equitable relief in this Court, nevertheless, would not your defensive position be a lot stronger if you had pending an action against the taxpayer in the Territorial courts?

MISS LEWIS: That is true.

THE COURT: I am afraid that you will have to say 'yes.' You may not want to. I won't make you answer it. But I think it would be stronger if you had —

MISS LEWIS: It would have brought in another section, Section 266. On the other hand, it would have been a situation where an attorney writes another and explains why he wants to do this and that. The information is used and you rush into a suit which perhaps was not going to be filed at that particular time.

THE COURT: Well, I think we are giving the whole situation too much attention, and I repeat I don't think there is anything in that area because it eventually gets back to treading on the agreement of the attorneys, which was made in good faith.

MISS LEWIS: Now, the court in the *Great Lakes versus Huffman* case says —" (Tr. 292-93)

"THE COURT (Tr. 297-298): Well, I was just wondering on that pre-emption business, if there might be a difference where, for example, the issue could be thrashed out in the state or Territorial courts without in any way impairing the use of the franchise or license afforded by the

radio commission, as distinguished from a situation where the action of the state or territory was such that the taxpayer couldn't use effectively the privilege that the federal government had given to him. In other words, translated, this radio station might well be able to (132) continue operating just as effectively as it has in the past while the state litigation involving the validity of the tax is going forward. On the other hand, if the state somehow or other took steps to close the radio station down while it pursued this litigation, might not that later be a different basis for coming into the federal court, and would not then the argument of preemption of the field have greater significance? For there the state would definitely be closing down a privilege that the federal government had afforded, and you would be interfering with interstate commerce."

"THE COURT (Tr. 313): Well, this may not get us anywhere but assuming that it is true that the radio station has only a couple more years to go on its existing license before it applies for a renewal, what I am getting at is, that this Court could get you to the Supreme Court faster than the Territorial court could. And you could collect your tax faster by staying in this Court than you could by going over to the Territorial court where you would have one, two, three, four steps to go through instead of three over here."

THE COURT (Tr. 314): Well, what is going to happen to your tax if, for example, the federal government sees fit for some reason or other not to renew KPOA's license and it goes out of business?"

The District Court ignored the answers to the questions brought up by the Court itself.

There is *no remedy* at all for the recovery of penalties exceeding $3,000.00 in this case. The time for appeal from the assessments had expired (same as in *Hillsborough v. Cromwell*, 66 Sup. Ct. 445).

Section 5535 (Appellants' Exhibit "C" attached to Complaint), Laws of Hawaii, expressly provide:

> "No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word *'valuation' shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219 (Appellants' Exhibit "C"), Laws of Hawaii, states (referred to in above Section 5535):

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or nontaxable. The balance*, if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Underscoring ours)

The "trick" in the above sections is that "valuation" is described in Section 5535 as *the amount of the income* when it comes to *refunding* in Section 5219, and the penalties, illegally collected (more than $3,000.00), become "a realization under the tax law concerned" (to the Territory). For a deposit preceding litigation, however, "penalties" must be included as part of the "income" (Sec. 5463), so win or lose the law suit, the Territory cannot help but make some money, i.e., from the "penalties" which are not returnable even though the tax is held illegal. These last statutes (5535, 5219, *supra*) repealed all other Hawaiian laws on the subject matter by implication. The statute, Section 1575, mentioned by appellee, which is silent as to "refunds" (Tr. 271), was passed in the year 1907 and must be construed in favor of the later enactments of 1945 (Sections 5535, 5219). The appellee considered these assertions of appellants as merely "hypothetical" (Tr. 456). The District Court knew this and remarked that Sec. 1575 was silent as to "refunds" (Tr. 271), yet ignored the question. Appellee cited instances of protest payments' being made under Sec. 1575, but no mention was made of a refund ever being given under it, or any decision of the Hawaiian Courts that a refund of penalties and interest was now possible under Section 1575, in view of the enactment of Sections 5535 and 5219. The "doubt of remedy" for appellants in the Territorial Courts (sufficient to come within the doctrine of the *Cromwell* case, Post) is therefore still with us as shown by the following subsequent events to the District Court's decision.

The District Court (Tr. 228) toyed with the idea of "retaining jurisdiction" (as was correctly done in the *Spector* case—Post), but abandoned the idea.

Upon dismissal of the Complaint, in spite of a Motion to Dismiss which admitted the truth thereof, and Motions for Summary Judgment filed by both appellants and appellee, which made the issues entirely one's of law (see *National Broadcasting Co. v. F.C.C.* (on Chain Broadcasting Rules) 63 Sup. Ct. 997, 319 U.S. 190 (1943)), the appellants were confronted with a real dilemna.

Pending appeal to this court, the Territory was going to sue. The time for appeal by appellants to local courts from the assessments had expired (this was admitted). Under Federal Communications Commission rules and regulations any judgment against appellants for more than $1,000.00 remaining unpaid for more than ninety days must be reported (Exhibits "B"" and "D," Complaint). "Economic Aspects" (Complaint, Tr. 10) of the Federal Communications Commission's regulations of a radio station are so rigid that automatically thereby, appellants' license is subject to an expensive "hearing" or "inquiry" if the judgment is unpaid. If appellants pay the judgment, however, a recovery of penalties and interest is impossible.

Therefore appellants *had to agree* and appellee agreed that appellants would bring an action under Section 1575 for $7,500.00 or more (sufficient to invest the $5,000.00 appeal minimum from the Hawaiian Supreme Court to this court). It was solemnly agreed by the parties that a general denial would be interposed by

appellee and the issues simplified as to the Constitutional questions. After appellants were thus nicely "trapped" the appellee counter-claimed for the entire amount (stating "nothing was said" about a counter-claim) including *penalties* and *interest*, to which appellants had no defense except to the Constitutional defense on Federal questions which could have been decided as expeditiously in the Federal Court. No defense was or could be interposed to the amount of the assessment, as the time for appeal therein had expired. Appeal is being taken upwards now from this decision of the local court. The "local remedy" so fondly described by appellee is further made quaint by the local practice where the prevailing counsel "writes the decision" of the "court" (?). The local court rendered an oral decision stating expressly and in substance that if appellants were situated in Vancouver, Washington, or El Paso, Texas, or Spokane, Washington, where its eminations would be heard in Oregon, Mexico, and Idaho, respectively, the court would have to decide for appellants. But, the local court went on to say, since appellants were situated 2,500 land miles from the mainland (notwithstanding the appellants derive their license from Title 47, U.S.C.A., where Hawaii is expressly included in the act by Section 301(a)), those stations "on the border" are in interstate commerce, while appellants and apparently "middle of state" stations, so to speak, are not engaged in interstate commerce. In other words, in spite of Congress' pre-emption of radio, in order to effectuate a national and uniform system of control, radio broadcasting is now "half taxed" and "half free" of

taxation, despite its rigid regulation from a national source, including all its "economic aspects." Taxes involve "the economic aspects" of any business. If this decision is followed, new stations will locate "on the Border," hereafter, and defeat the intent of Congress to serve *all* the people of the states and not just those "on the Border."

(An appendix will be set forth in the Reply Brief quoting the "local"' court's oral "decision," which will be enlightening to students of the law, along with the more polished "decision" of the prevailing counsel. This "practice" is still prevailing in Hawaii as part of the so-called 'adequate remedies" afforded appellants. Litigants are entitled to a "competent court."

Quere: Is the "decision" of the prevailing counsel, upon which an appeal must be taken in Hawaii, a "decision" of a competent court?" Further, is such "practice," due process? Is it a judicial hearing or review within Constitutional understanding?)

THE QUESTIONS ON APPEAL

1. Can a Federal Court, jurisdiction admitted by the court itself, shrink from performing its plain judicial duty under the guise of a discretionary power, which power expanded itself beyond the limits of its logic in the light of admitted facts alleged in the Complaint and affidavits?
2. No suit existed between these parties in any Territorial Court. "Discretionary power" can be *implied* only from the fact that the Congress, in the enactment of the Declaratory Act, merely conferred the power to the courts to grant the remedy without prescribing conditions under

which declaratory relief is to be granted. Can mere implication of a 'power" nullify the granting of the enacted remedy where facts, as appellants alleged, were uncontroverted?

3. The court's statement that "convenience is not a factor" and "speed is not a factor" strikes a strange note in American jurisprudence, jurisdiction obtaining as a Federal Court, and with substantial Federal questions on Federal rights to be decided. Therefore, when the Johnson Act expressly makes "speed" and "efficient" remedies in State Court an actual criteria as to whether the Federal Courts shall permit a state court remedy to prevail, can a Federal Court nullify and ignore such language of the Johnson Act, especially in the light of the facts disclosed in the transcript?

SPECIFICATION OF ERRORS

1. The District Court's judgment was contrary to law, for the substantial and uncontroverted allegations of the Complaint, as a matter of law, supported the entry of a declaratory judgment, as well as a temporary injunction.

2. The District Court, after finding it had jurisdiction, had no right to utilize its discretionary powers in order to coerce appellants to foresake and forego federal rights guaranteed by the United States Constitution and the Federal statutory scheme for a complete judicial review of a cause of action rightfully before the court.

3. The District Court's final judgment was calculated to avoid a decision on substantial questions, and

was an abuse of judicial discretion in that, finding jurisdiction obtained 'on a variety of grounds,' the District Court shrank from performing its plain judicial duty by withholding from the appellant a decisive safeguard against legislative excess — the safeguard guaranteed by statute and this court—"Judicial Review."

4. The District Court carefully shifted the statutory scheme for judicial review of legislative excess to this court, where unresolved substantial questions now confront this court virtually as problems of first instance, when as a matter of law the District Court should have completed the case and entered a Declaratory Judgment for the appellants.

5. The practice of withholding so-called discretionary privileges or procedural advantages, as the District Judge did in this cause, because of undisguised expressions and solicitude for non-existent or vagrant remedies within the judicial scheme of a Territorial Sovereign, despite its legislative excesses, over the rights of individuals, expands the principle of "judicial discretion" beyond the limits of its logic, especially where the rights under the policies, and the philosophy behind the Federal Declaratory Judgment Act and the Communications Act are defeated thereby.

6. The court erred in denying appellants' Motion for a Declaratory Judgment, and in refusing to proceed beyond "jurisdictional grounds," the District Court's oracular edict and subsequent judgment demonstrated no discretion against "judicial legislation" in order to avoid a decisive answer to appellants' substantial questions.

7. The court erred in denying appellants' Motion for a Temporary Injunction.

8. The court erred in denying appellants' Motion for Summary Judgment, as there was no genuine issue as to any material facts, and the appellants were entitled to judgment as a matter of law.

9. The District Court erred in failing to grant the relief prayed for in the Complaint and other motions of appellants.

10. The District Court erroneously confined the proceedings to the sole question "of jurisdiction," a matter of law, then when this was shown, promptly by some unique legal alchemy, and without any evidence or further hearing, withheld equitable relief by coercing appellants to embark upon other and unknown legal waters in search of equitable relief, when the confusion over these substantial questions could have been obviated by decisive action of the District Court.

11. Frustration of Congressional policy, as reflected in the Declaratory Judgment Act, has been irrevocably congealed unless the District Court's plain duty of deciding the substantial questions raised by the Complaint is assumed by this court.

12. By admitting jurisdiction existed, the District Court had to recognize the substantial character of appellants' allegations in their Complaint, yet consonant with the District Court's forthright policy of indecision, and its withholding of equitable relief, not only were the benefits of the Declaratory Judgment Act denied appellants, but the District Court has augmented and added to appellants' woes.

13. No Judicial Review was given appellant by the District Court, even though appellants raised many substantial questions, nor were any answers received thereto, which is appellants' due, consistent with the true meaning "Judicial Review" of legislative excesses by a court of competent jurisdiction.

14. The District Court, by its ruling, has denied to appellants their statutory and common law rights to challenge the excesses of a sovereign by denying that the elements of convenience and speed are factors in the settlement of a private citizen's troublesome affairs with an excessive sovereign where jurisdiction as a Federal Court exists, as it ruled. Yet, the District Court, by its action in withholding relief in this case, has coerced appellants into two new courses of expensive, time consuming, prolonged and inconvenient actions, namely, (1) appeal to this court, and (2) a suit simultaneously in the Territorial Courts where such Territorial action will belatedly, if it ever does and while appellants are uncertain it ever will, land in this court. Whereas, by decisive action, this expense and inconvenience could have been disposed of.

15. The District Court erred in failing to declare and hold that the Hawaiian Excise Tax on Radio Broadcasting, as assailed in the Complaint, was illegal and unconstitutional.

16. The District Court erred in failing to hold that the tax on radio broadcasting, as assailed by appellants, levies a burden upon interstate commerce, and that the Territory of Hawaii unlawfully concerned itself with a subject matter pre-empted by Congress

and which is no longer a subject matter upon which states or territories may legislate, because exclusive concern and regulation thereof is vested in Congress and the agencies designated by Congress to so regulate, and in this case, the Federal Communications Commission.

17. The District Court erred in not finding that the said tax as pertains particularly to Radio Broadcasting was in violation of the Hawaiian Organic Act, as well as the Constitution of the United States, and the District Court further erred in failing to enter judgment for the appellants as a matter of law, and in considering speculative remedies existed elsewhere, where the appellants had Federal jurisdiction as a matter of right, without regard to vague and speculative "judicial policies" and a "judicial discretion" which is in conflict with accepted Federal rights of a Federal nature." (Tr. 170-174)

ARGUMENT

(On Specification of Errors 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14.)

> "THE COURT: I am well satisfied that of the cause stated in the complaint this Federal Court has jurisdiction on a variety of grounds: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations." (Tr. 467)

Compare the foregoing with Sections 1265 and 1266, Vol. 3, Federal Practice and Procedure, Barron and Holtzoff (Rules Edition).

Section 1265.—Discretion of Court:

> "The granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest. It is always the duty of the court to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Some cases have said that where governmental action is involved, courts should not intervene unless the need for relief is clear, not remote or speculative." (Cites cases)
>
> "That it should rest in the court's discretion is implied from the fact that the act merely conferred power to grant the remedy without prescribing conditions under which it is to be grant-

ed (cites cases). This discretion is not absolute. It is a sound judicial discretion reviewable on appeal (cites cases). In exercising its discretion the court should not extend the remedy if to do so would entail a piecemeal litigation of the matters in controversy (cites cases). The court may weigh the inconvenience and burden to litigants living at a distance (cites cases)."

Section 1266. — Existence of another Adequate Remedy:

"Rule 57 specifically provides that the existence of 'another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate' (cites cases). However, even before this rule the courts had applied the same principle (cites cases). A federal action for a declaratory judgment, if otherwise appropriate, should not be dismissed merely on the ground that another remedy is available or because of a pendency of another suit, if issues in the declaratory judgment action will not necessarily be determined in that suit (cites cases). Even if the parties and the subject matter are the same in both actions, pendency of a prior action in another federal district court does not necessarily require dismissal of the declaratory judgment action (cites cases). The pendency of another action in the state courts is not a bar to declaratory relief. The determinative factor is whether the action for that relief will probably result in a just and more expeditious and economical determination of the entire controversy." (cites cases)

"The general rule is that the existence of another adequate remedy does not bar a declaratory judgment." (cites cases)

> "Nevertheless, unnecessary interference with state court litigation should be avoided (cites cases). Ordinarily a federal court will not entertain an action for a declaratory judgment where another proceeding is already pending in the state courts in which all matters in controversy between the parties can be fully adjudicated (cites cases). The court before entertaining an action for a declaratory judgment involving a controversy some aspects of which are the subject of an action in the state courts, must ascertain whether the matter can better be settled in the federal court. To do this it must first ascertain whether all matters can be adjudicated in the pending state courts proceeding; and whether necessary parties have been joined and are amendable to process (cites cases). Or the matter may be resolved by a determination of the question whether there is such plain, adequate and speedy remedy afforded the plaintiff in the pending state court action that a declaratory judgment will serve no useful purpose." (cites cases)

The Johnson Act (Section 1341, U.S.C.A.) does not apply to "Territories" any more than the Three Judge Federal Court Statute (Sections 2281-84, U.S.C.A.). The Supreme Court in *Stainback v. Mo Hock*, 336 U.S. 368, 69 S. Ct. 606, held that the Three Judge Statutes' reference to "states" did not apply to "Territories". This decision was in 1947. The revised Judicial Code was enacted and signed by the President in June, 1948. Therefore, Congress had knowledge of the Supreme Court's views as to the difference between "states" and "territories". That decision was uttered a year before Congress enacted the Code. If Congress had

intended that Section 1341 (Johnson Act) should include the word "Territories", Congress would have so enacted such into law as it did just a few sections before 1341, where in Section 1332 at the same session, Congress inserted subsection B of the Diversity Section, stating:

> (B) "The word 'states 'as used in this Section, includes the Territories and the District of Columbia." (June 25, 1948)

Thus, the erroneous policy of judicial abstention, or discretionary abstention, as applied to this case, is met at the outset with negation by this plain expressed intent of Congress. Congress enacted the Declaratory Remedy. Judicial process is intended to effectuate, not congeal Congressional policy. The Declaratory Act is plain. Under Rule 57, even a right to trial by jury is given by the Declaratory Act, and this implies that the Act was to be more than a mere "discretionary" judicial *grant*. On the contrary, plain reading discloses it to be a valuable *right* to a citizen:

> Rule 57. Declaratory Judgments.
>
> "The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

In reason it is difficult to see how this statute and

rule can become so emasculated without omission on the part of the courts. The Declaratory Statute is neither legal nor equitable, but a Civil action (Section 38.29, Moore's Federal Practice (2nd Edition)). Thus, the only way emasculation and confusion can ensue over the application of this *right* is by an abuse of judicial discretion. There is a legal pun to the effect that there is a thin line between judicial "discretion" and "indiscretion". We in the legal profession must derive content, when discretion is abused, with the thought that there is always a right of appeal. So there is, but how many cases are appealed to this court from the number filed in the District Courts? This court can take judicial notice that the appeal in this case will entail costs in excess of $2,000.00 (Printing, $1,000.00; reporter's transcript, $800.00; briefs, $300.00)not counting lawyers' fees . Thus, a litigant is entitled to a complete and full hearing—a searching inquiry into his allegations, and just as much solitude for his *rights* as the court expresses for the *rights* of an excessive sovereign. All of this is supposed to be known by an experienced trial judge. The District Court stated, in substance, "Jurisdiction obtained; the parties are all here—am familiar with the case, etc. * * *" (Tr. 467). No other action was pending. Why wasn't the case decided? Why were appellants coerced into a local forum where *the prevailing lawyers write the decisions of the courts?* (Hawaiian Circuit Court Practice—see *supra.*) Why was the expressed law of Hawaii denying refunds of penalties and interest glossed over?

Why is a Territory or State entitled to be protected

in their wrongdoing by indirect and omissive action of the courts? In *Williamson v. U. S.*, 95 Law Edition 1379 (1383), Mr. Justice Jackson in setting bail for certain Communists refused to countenance a denial of Federal rights by indirection, as the District Court did in this case at bar. The Justice stated:

> "* * * If the Government cannot get at these utterances by direct prosecution, it is hard to see how courts can justifiably reach and stop them by indirection. *I think courts should not utilize their discretionary powers to coerce men to forego conduct as to which the Bill of Rights leaves them free.* Indirect punishment of free press or free spech is as evil as direct punishment of it. Judge Cardozo wisely warned of 'the tendency of a principle to expand itself to the limit of its logic.' If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition which I am sure the Department itself would deplore." (Italics ours)

The Congress did not intend, ever, to deprive litigants of their lawful claims or defenses by permitting an abstract personal conception of justice by an individual judge or a personal conception of a court's power to be substituted for Federal statutory rights or for rights recognized by rules of substantive law flowing therefrom. Especially is the foregoing true, and it becomes harmful, if rights flowing from Federal statutes or from the Federal statutory scheme for the

administration of justice are deliberately ignored and and displaced by an assumption of a court's power and duty that could lead only to unjustified expense, and to its consequent sequel, disrespect for all law. In other words, if Congress gives a right, can a court admit jursidiction but withhold that right on a mere caprice of its own? If it can, then we do not need Congress.

No judicial scheme for the administration of justice can be premised upon personal emotion, or upon transitory predelictions of an individual judge. If so, there can be no integrity in the law. It is for this reason that the term "judicial discretion" is a limited one, and cannot, ever, overpower statutory rights, or even those uniform and settled rights flowing from *stare decisis*. The public cannot abide by or adhere to law unless the law has uniformity and certainty.

Congress gave the Federal courts power to "declare" rights where issues were confused. It, therefore, becomes a duty for a court to declare rights where jurisdictional requirements are met. This duty is primary and prescribed and cannot be shrugged off by a capricious adaptation of the term "Judicial Discretion," to the end that the phrase, as practiced upon appellants by the District Court of Hawaii, is but legal alchemy whereby there is precipitated a denial of recognized rules of substantive law and Federal rights flowing from a Federal statute to appellants:

AT THE WORST,

> "The discretion of a judge is said to be the law of tyrants. It is always unknown; it is different in different men; it is casual, and depends upon

constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quae minimum reliquit arbitrio judicis; optimus judex qui minimum sibi.* Bac. Aph.; 1 Cas.(Pa.) 80, note; 1 Powell, mortg. 247a; 2 Belt, Supp. to Ves. 391; Toullier, Dr. Civ. liv. 3, note 338, 1 Lilly, Abr. 447."

AT THE MOST, the discretion of a judge consists of:

"The power of a judge, in *certain matters*, to decide in accordance with his own judgment of the *equities* of the cases, unhampered by inflexible rules of law (not statutes, however). The lattitude allowed to judges as to the action to be taken on *certain facts* (not law). See 34 Barb. (N.Y.) 291.

"And many matters relating to the trial, such as the order of giving evidence, granting of new trials, etc., are properly left mainly or entirely to the discretion of the judge.

"As applied to executive officers, it means a power to decide on the propriety of certain actions, without any review by others.

"* * * In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful." (Notes and Italics ours)

Cyclopedia of Law, Third Edition.

The function of judicial review is dispassionate and disinterested adjudication, unmixed with any concern as to success of either prosecution or defense. *U. S. v. Morton Salt Co.*, Ill. 1950 70 S. Ct. 357, 338 U.S. 632.

Excessive concern of the courts for "excessive" sovereigns makes the term "comity", when misapplied as

here, a mawkish term in the light of the definition of "judicial review" above. Failure of a court to do its plain duty, and adopting a policy of indecision by the use of the term "judicial discretion" does not constitute "judicial review," to which the most impoverished citizen is entitled. If so, then "judicial discretion" becomes an unknown, surprising and unstudied legal mixture, precipitating passion and caprice as a synthesis for law and statutory rights. If "judicial discretion" can be used to withhold rights flowing from a Federal statute, or to deny "judicial review" of or a "declaration" on substantial and admitted Federal questions in spite of a prescribed duty to do so, then the power of a judge becomes uneasily superior to the legislative branch of the government, when equal balance was constitutionally intended.

The withholding of statutory rights, or refusing to decide admitted substantive federal questions under the guise of "judicial discretion," even with the best of intentions, is dangerous and leads but to coercion. It is better to decide the issue, jurisdiction admittedly obtaining, or even if doubt prevailed, than the adaptation of a policy of indecision, erroneously based upon a misapplication of a statute or rule of law (Johnson Act and its philosophy). By refusing to adhere to the plain prescribed new remedy as afforded by the Declaratory Act, jurisdiction as a Federal court existing as the court admitted, and refusing to function as a court to judicially review excessive acts of a sovereign simply because of an unsound and unwisely conjured policy of "abstention" because a sovereign is involved, a court thereby sloughs off its robes of ju-

dicial office and must perforce view in doubtful tranquility its new and uncommon roll as a "legislator" by indirection.

Resolute and adamant to the end, and ostensibly proud of this new found "power"—"judicial discretion"—and in order to avoid a decision and thereby irrevocably congealing the rights given to appellants by Congress under the Declaratory Judgment Act, this District Court not only completed its abdication as a court, and subconsciously became a "legislator", but in doing so, it unwittingly frustrated the statutory scheme for judicial review by shifting to this court the District Court's primary and prescribed responsibility for a judicial review of the acts complained of in Appellants' Complaint.

Judicial "legislation" was indulged and utilized with undisguised frankness for the solicitude of an excessive territorial sovereign to the detriment of citizens of the United States—the appellants. In addition, the District Court's utter abstemiousness as to any thought or care about adding to appellant's woes, through its policy of indecision, is embarrassing to thoughtful students of the law. The principle of "judicial discretion" was expanded beyond the limit of its logic in this case and a defeat of Congressional philosophy and policy, as expressed in the Declaratory Judgment Act, resulted. A policy of solicitude to an excessive sovereign, conveyed through a forthright policy of indecision, cannot be fitted into any category of equitable jurisprudence. There is nothing equitable about it.

Appellants were thus compelled to forego their rights in a District Court of the United States in spite of decisions of the Supreme Court of the United States in *Fishers Blend v. State of Washington*, 297 U.S. 650, holding radio, as such, could not be taxed by a state. This ruling was reaffirmed and reiterated in *Western Livestock v. Bureau of Revenue*, 58 Sup. Court Rep. 546, wherein the court stated "if broadcasting could be taxed, so also could reception," and thus brought Radio Broadcasting into those enterprises where a state tax would be an illegal multiple burden (see *Freeman v. Hewit*, 329 U.S. 249, and *Carter v. Weekes*, 330 U.S. 422).

"Comity" had nothing to do with this case. There was no "state" involved. There was no "pending" action or actions in the Territorial Court. "Discretion" was misapplied for its application aided an alleged wrongdoer—an excessive soverign—who, at this stage of the proceedings, admitted its excessiveness by its motion to dismiss. Yet in effect, and by this decision, a wrongdoer, as long as it is a "sovereign" of a sort —even less than a state—can challenge and overwhelm a citizen of his rights to a judicial review. This decision impinges public policy and will, if followed, lead to an unjustified smirtch on the reputation of the Federal Judiciary.

It was timely for a declaration of appellants' rights by a Federal Court. Two states, Arkansas and New Mexico (in *Beard v. Vinsonhaler* (1949) 221 S.W. (2d) 3, and *Albuquerque Broadcasting v. Revenue* (1950) 215 P.(2d) 819) had ruled diametrically opposite to the *Fishers Blend* case (*supra*) and ignored

the Supreme Court's augmentation of its prior holding in the *Western Livestock* case (*supra*). Confusion prevailed as to appellants' rights. Appellants were entitled to a Federal Court ruling on Federal questions, since appeals were denied by the Supreme Court from these state decisions, and since the territory took the position these denials of appeal overturned the *Fishers* case (*supra*). The New Mexico case falls of its own weight as its predicate was wrong:

> "As we understand, it is not held in the *Fishers Blend* case that *all* broadcasting is interstate commerce." (Italics ours)

Justice Stone in the *Fishers Blend* case expressly stated:

> "The essential purpose and indispensable effect of *all* broadcasting (not just 250 watts' or 5,000 watts' power, but *all* broadcasting) is the transmission of intelligence from the broadcasting station to distant listeners." (Note and Italics ours)

The Complaint in this case was comprehensive. The Motion to Dismiss admitted its truth. It was alleged that the penalties of this tax could not be recovered under Hawaiian law (Tr. 321). Sections 5463, 5469, 5473, 5535, 5219, Hawaiian laws, all repealed by implication appellees' so-called "remedy" Section 1575 (which was enacted in 1907) and there is no provision for repayment of over $3000.00 in interest and penalties today. There is, therefore, a legal dispute now as to whether there *is a remedy at all* to recover penalties and interest in case the law is held invalid. This alone justified the application of the Declaratory Act in appellants' behalf.

The case of *Hillsborough v. Cromwell*, 66 Sup. Court 445, 326 U.S. 620, is extremely apt to this case. The complaint of appellants alleged that the time for appeal had expired. Appellee does not deny that. In fact appellee belatedly promised to "sue" appellants to "create" an "adequate" remedy "after the fact," so to speak, if the District Court would dismiss this case. The District Court, after the danger of the non-recovery of penalties was pointed out, suggested appellants could become "defendants" (Tr. 232), in some manner believing such rearrangement of the parties could make up for the inadequacy of the Hawaiian remedies for the recovery of penalties and interest.

In *Hillsborough v. Cromwell*, 66 Sup. Ct. 445, 326 U.S. 620, the taxpayer's opportunity to appeal to a New Jersey Board of Tax Appeals had expired before the Federal District Court ruled on a motion to dismiss the taxpayers' action for a declaratory judgment that the assessments were void. It was not clear, as in the case at bar on the penalties, that the taxpayer had open any adequate remedy for challenging the assessment on local grounds and it was held that the Federal Court was not required to hold the case until a determination of local law was made by the state courts. A remedy at law cannot be considered as adequate so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. In the case at bar, we do not challenge just the penalties, but the entire tax.

Even though the New Jersey remedy on the local law question was available to the taxpayer, who claimed to have been singled out for discriminating tax-

ation, an uncertainty surrounded the New Jersey remedy to protect the taxpayer's federal right, as here at bar, and a refusal of the Federal Court to dismiss a bill for a declaratory judgment that the assessments were void, was held to be a proper exercise of discretion by the Supreme Court and the Federal District Court was held to have properly proceeded to decide the case on the merits.

The uncertainty surrounding the New Jersey remedy to protect the taxpayer's federal rights justified the Federal District Court in proceeding to decide the merits of a taxpayer's bill for declaratory judgment that the New Jersey assessments were void. The Supreme Court held that the fact the court placed its decision on local grounds was not objectionable. Here at bar, appellants claim over $3000.00 in penalties will be unlawfully "taken" by Hawaii plus interest. The Hawaiian statutes say "they will become a realization" (*supra*). There is not even any uncertainty about that. Anent mere "uncertainty," the Supreme Court said:

> "In the present cases, it appears that respondent's opportunity to appeal to the State Board of Tax Appeals had expired even before the District Court ruled on the motion to dismiss and it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.
>
> "It follows that the bill should not have been dismissed. As stated in *Greene v. Louiseville*, 244 .S. 499, 520, 37 S. Ct. 673, 682, 'a remedy at law cannot be considered adequate so as to prevent equitable relief, unless it covers the entire case made by the bill of equity.'

"Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus, however, the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule in *Great Lakes Dredge & Dock Co. v .Huffman* (319 U.S. 293, 63 S. Ct. 1070, 87 L. ed. 140). The district court therefore properly proceeded to decide the case on its merits. That it placed its decision on local law grounds is not objectionable. For it is well settled that where the Federal Court has jurisdiction it may pass on the whole case. * * *"

The Supreme Court held also in *Brown v. Western Railway*, 70 Sup. Ct. 105, that a federal right cannot be defeated by forms of local practice and the Supreme Court held it could not accept as final a state court's interpretation of allegations in a complaint asserting a federal right. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Appellants refer to the *Stainback* case, 336 U.S. 368, 69 Sup. Ct. 606 (*supra*). That case did not turn on the simple question of "protecting" the appellate court's "convenience" and we quote the court as follows:

"* * * While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts, the *predominant* reason for the enactment of Judicial Code Section 266 does not exist as respects territories. This reason was a

> Congressional purpose to avoid unnecessary interference with the laws of a sovereign state. In our dual system of Government, *the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to Congressional regulation." (Italics ours)

The foregoing decision does not in any way detract from the powers and duties of a Federal Court in Hawaii as compared with the constitutional Federal Courts on the mainland. Congress simply did not write the word "Territories" either into the Three-Judge Court Act or into Section 1341, the Johnson Act. The courts cannot "legislate" those words into Congressional enactments. The Congress has to do that.

Not only had the time expired for any local remedy, even if the Johnson Act did apply, prior to appellants going into the District Court but the penalties of ten per cent of the Nineteen Thousand Dollars involved herein, plus a two-thirds per cent interest per month are in excess of Three Thousand Dollars. There is no provision in the Hawaii law for the recovery of these penalties in case the law were held invalid even if the money were paid into a local account as insisted by appellee. This is an unconstitutional "taking". If the law were held invalid, under appellee's argument, the "income" paid could be recoverable, but the penalties exceeding Three Thousand Dollars would be confiscated in violation of plaintiffs' constitutional rights. No provision exists for their return even if extracted by an illegal tax. In fact, Sections 5535 and 5219 remove any "uncertainty" and say they shall be "re-

alizations" or mere "prizes," as you will, of the Territory. No appeal could be taken through the local courts for the recovery of these penalties in excess of Three Thousand Dollars nor could any court action be appealed to the United States Circuit Court of Appeals on an appeal from a local court because the sum of penalties is less than Five Thousand Dollars.

There were no elements or issues of criminal law in this case where equity could not interfere. Then, too, the Declaratory Act is more than an equitable action (See Moore, *supra*). A right of trial by jury given by the Act, and Rule 57, gives the Act a Congressional dignity not heretofore allowed by some courts which mere "judicial discretion" has no right to obliterate.

The late case of *Georgia Railroad and Banking v. Redwine*, 96 Law Edition, 255 (advance sheets) holds that an adequate state remedy existing as to only a portion of state taxes, the assessment and collection of which is sought to be enjoined in a Federal District Court, does not dispossess the Federal Court of jurisdiction over *the entire controversy.* Here, the inadequacy of a remedy for the return of the penalties exceeding $3,000.00 is in question. That alone afforded Federal jurisdiction, as the appellants are entitled to have their case tried other than by piecemeal. The *Georgia Banking* case, *supra*, cited the following note:

> "An adequate remedy as to only a portion of the taxes in controversy does not deprive the Federal Court of jurisdiction over the entire controversy." *Greene v. Louisville Rd.*, 244 U.S. 499; *Hillsborough v. Cromwell, supra.*

In *Alabama Public Service v. Southern Railway*, 341 U.S. 341, 95 Law Ed. 1002, the Supreme Court said:

> "We also put to one side those cases in which the constitutionality of a state statute itself is drawn into question (as at bar). For in this case, appellee attacks a state administratrive *order* issued under a valid *regulation* statute designed to assure the provision of adequate *intra state* service by utilities operating within Alabama." (Italics and notes ours)

Radio is not intrastate (*Fisher's Blend* case, *supra*) —nor a utility (Title 47, U.S.C.A.); and the court in the Alabama case (*supra*) while holding the Johnson Act was not applicable, yet indicated indirectly that the Federal judiciary are not, as yet, completely derived of power to aid citizens.

> "A Federal Court of Equity should stay its hand in the public interest when it *reasonably* appears that *private interests will not suffer.*" (Italics ours)

The Territory has more money and lawyers than appellants. Appellants are suffering. Appellants have suffered an unusual expense herein where "speed" was held not to be a 'factor;" and "convenience" not a "factor," in spite of the fact that "the parties are all here" (See Tr. 467).

In *Spector Motors*, 340 U.S. 602, 95 L. Ed. 573, the Supreme Court held that a Federal District Court had jurisdiction to entertain an action to enjoin the collection of state taxes alleged to have been imposed in violation of the Federal Constitution when the adequacy of a remedy in the state courts was uncertain;

and that such jurisdiction is not lost by virtue of a later clarification of the proceedure in the state courts. This case will be explored in the later part of this brief.

In *Meredith v. Winter Haven*, 64 S. Ct. 7 (11), the Supreme Court stated:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, eral rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment (cites cases). When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act * * *.
>
> "But none of these considerations, nor any similar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this

case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

"*Erie R. Co. v. Tompkins*, *supra*, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest

state courts might ultimately give remained uncertain (cites cases). Even though our decisions could not finally settle the questions of state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication."

Argument on Specifications of Error Nos. 15, 16 and 17

There is occasion, because of the public interest, which transcends private or state interests, no matter how irritating the loss of revenue to either that the case may decide, for proceeding thoughtfully, deliberately and fairly, to the end that the public interest will be served. Radio regulation and the law pertaining thereto must be based on a recognition of sound engineering, as well as legal, principles. Radio and television have had a comparatively short life and they are a new science and art. Only a uniform and scientific system of national control, and of the most sensitive kind, will make it available to all the people as was the intention of Congress when it pre-empted the ether as early as 1927 by the Radio Act, re-enacted in 1934 and amended in 1946 (Title 47, U.S.C.A.). Transmission of intelligence by radio is the most unique and sensitive of all forms of interstate commerce. No more sensitive form of commerce is known to mankind. The public interest required Congress to administer and conserve the ether for the maximum

benefit of all the people of the United States and its possessions. Since the first Radio Act of 1927, as now amended, the Congress had to contend with local interests, state legislatures and lesser bodies, who sought to frame laws imposing a measure of control on radio transmission, its reception, and on the use of the apparatus by which transmission was brought about. Of all those local measures, only three were legitimate and useful and within the scope of the police power.

No effort will be made herein to point out all of those held to be void because of interference with the authority of Congress. Since radio communication was such a sensitive form of interstate commerce that it could only admit of, and required, a uniform system of control throughout the nation, if not throughout the world, this uniform control was vested exclusively in Congress and in its agencies to the exclusion of the so-called police power of the states. Only three of the local measures, however, were legitimate as aforesaid, but all the rest of them unconsciously ignored well established legal and engineering principles and practices that a systematic national control required.

To aid the court in its research for a correct pronouncement of law in this case, the writers hereof will point out some of the mistakes, both of policy and of law in the state measures which resulted in Congress taking full control of the subject matter.

Congress preempted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Con-

gress not used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" aspects of a station at all. However, Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" aspects of a station, under the Act of Congress. State taxes affect the "economic" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The reasons for this complete national control, and the wisdom of Congress in taking such can be readily demonstrated to mistaken state taxing authorities when a short history of the chaos prevailing before Congress did so is set forth, as we do:

History of National and Attempted State and Municipal Regulation of Radio

The more rapid progress of scientific achievement than of legal control is nowhere better illustrated than in the history of radio legislation. An act to regulate Radio Communication was first passed August 13, 1912 (37 Stat. 302), and such law was in effect until 1927. It was drawn with a view, among others, to encourage the development of the radio-telephone art, as it was then called. No one then contemplated the magnitude of that development into our modern day broadcasting and television. The licensing of radio transmission was placed with the Secretary of Commerce. It was first held in *Hoover v. Intercity Radio Company* (286 Fed. 1003; 1923) by the Court of Appeals of the District Columbia that the granting of a

station license was a purely ministerial act and that mandamus would lie to compel the issuance of a license. Later, on July 8, 1926, the Attorney General of the United States held that the Act of 1912 was a "direct legislative regulation of the use of wave lengths" and that the Secretary of Commerce had no authority to limit the time during which stations might operate, the amount of power they might use or to specify the frequency band which they might occupy (35 Op. 126). These rulings resulted in chaos. Everybody was on the "air" and no one could hear "anyone". There was nothing but "whistling" and "chatter", and interrupted "chatter" at that.

The foregoing illustrates the so-called breakdown of the law on radio. The great number of broadcasting stations, their conflicting desires, and the selfishness of many of them, all coupled with the inability of the Secretary of Commerce to refuse licenses or to restrict their utilization brought about an intolerable condition of chaos and interference in the broadcast portion of the spectrum.

Legislation had been theretofor requested, but this dramatic breakdown of the law caused Congress to pass the Act for the Regulation of Radio Communications of 1927, and Congress created a Federal Radio Commission to enforce that Act. It was fairly obvious even after that Act was passed, because of new achievements, new and unheard of developments, and because of physical and scientific factors, that the Act of 1927 was not the ultimate answer to this new form of science. Immediate demands for new legislation became evident through popular demand. And this demand

for new legislation primarily came into being and broke out through its most accessible outlet—municipal and state legislative bodies. This attempted state and municipal control, while in a large measure springing from a sincere desire to improve reception conditions, began to broaden itself in scope and turn into innumerable forms, until Congress, in 1934, took complete control.

The earliest municipal legislation was enacted as long ago as January, 1923, by the City of Acheson, Kansas, where that city provided penalties for anyone "unnecessarily and electrically disturbing the atmosphere within the limits of this city." Minot, North Dakota, in 1925, decided to impose certain quiet hours upon its citizens and inhabitants; in October, 1926, Wilmore, Kentucky, imposed an annual license tax of One Hundred Dollars ($100.00) upon "all owners or operators of each broadcasting or radiocasting station operated within the limits of this city"; Minneapolis, Minnesota, in February, 1927, imposed a tax similar to that of Wilmore, Kentucky, and went farther in attempting to prescribe the location of stations. Besides attempting to prescribe local license or privilege taxes, and limiting the hours of reception appartus, and restricting the hours of transmission (all of which were subsequently held illegal or swept away by the preemption of Congress), some of the municipalities lawfully dealt with the (1) location of transmission equipment by making zoning laws applicable to radio towers and buildings; (2) control of loudspeaker operation; and (3) laws dealing with apparatus construction relating to fire hazards. The law relating to loud-

speaker equipment does not concern itself actually with transmission, but lawfully abates a noisome nuisance. A reasonable zoning regulation to prevent the erection of unsightly towers and buildings in a residential or restricted neighborhood is considered legitimate. While there are no known cases on this particular point, if a local Board were to arbitrarily "zone" a community from having broadcast facilities, the power of Congress would prevail over a local ordinance for the Commission must prescribe the location of a station. Laws dealing with the apparatus construction are no longer obtaining in radio, because of the Federal Communications Commission's supervision over any and all hazards. The Commission has recognized that poorly constructed towers may collapse and that poorly constructed or unprotected wire lines would result in electrocutions and fire hazards. Local ordinances are now no longer self-controlling, although comity prevails.

The development of this uniform system of control of radio communication by the Congress was accompanied by long and expensive quarrels over the power of the Government to regulate such communications. Thousands of state and municipal ordinances had been enacted only to be found invalid, unwise, and were swept away by the Communications Act. Radio communication, which must be and is the natural parent of television and frequency modulation, must be held to have traversed this handicapped route by the Acts of Congress in assuming control of the subject matter. Congress had foresight. In 1934 (Title 47, Section 153) it defined communications as including "pictures." Vi-

tal elements in the national and international development of radio and television cannot be handicapped by any other than a national and uniform system of control.

Many states and municipalities attempted to tax receiving sets and the Federal Courts uniformly held that Congress, by its preemption of the ether, forbade any tax on receiving sets.

So it is with Broadcasting and Television. Congress only can tax broadcasting, yet it has refrained from doing so because Frequency Modulation and Television Broadcasting are now in the offing. The slightest tax by a state becomes a "financial" and "economic" burden and retards the art in its infancy. It is the revenue from Radio that can only bring Television into being. When Congress considers the field of radio ready for a tax, only Congress can do so, as on receiving sets.

Further, from the history of radio legislation, and decisions of the courts, it is believed that if states must tax the radio field, the states must first obtain a concurrent right from Congress, and not obtain that right from the courts. A tax is a burden on commerce. A burden is a legislative determination. The court has no desire or right to legislate by indirection or directly. Nor has an inferior legislative body the right to create a burden on a field that Congress has already assumed within its power. As a matter of law, and presently so, such a tax is illegal.

As aforesaid, most of the municipal and state measures were held invalid, abandoned, or repealed because of their invalidity. Radio stations were held uniform-

ly by the Federal Courts to be exclusively engaged in interstate and foreign commerce; license fees imposed by municipalities and states were uniformly invalidated. See *Whitehurst v. Grimes*, 21 F.(2d) 787 (D.C.E.D. Ky. 1927); *Station WBT v. Poulnot*, 46 F. (2d) 671 (D.C.E.D. S.C. 1931); *Tampa Times v. Burnett*, 45 F.Supp. 166 (D.C. S.D. Fla. 1942), and *Atlanta v. Atlanta Journal Co.*, 198 S.E. 788.

A gross receipts tax imposed upon the "business" of radio broadcasting was declared invalid by a Three-Judge Federal Court, Ninth Circuit, in *KVL v. State Tax Commissioner* (State of Washington) 12 F.Supp. 497; and a gross receipts tax was declared invalid by the Supreme Court of the United States in *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650.

However, mere dictum by the Supreme Court, and kindly latitude of that court in discussing a badly pleaded case before it, in the *Fisher's Blend* case, has led to a grossly inaccurate interpretation of that court's decision. It is thus that we are today confronted in this case as to just what the correct ruling should be on a gross receipts tax on the "business" of radio broadcasting, although a careful reading of the *Fisher's Blend* case and the *KVI* case shows that any contention for a gross receipts tax by a state or tertory is contrary to the intent of Congress, and Federal Court decisions.

Subsequently, advantage was taken by legislative bodies of the last paragraph of the Supreme Court's decision in the *Fisher's Blend* case, wherein the court, after fully answering and negatively disposing of argument not even advanced in the pleadings, concluded:

> "Whether the state could tax the generation of such energy (referring to only the preceding paragraph's discussion of the *Utah Power* case, which was held inapplicable to radio, and which case involved a power company's generation of energy as distinct from its transmission of such current into other states by land lines) or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide." (Note ours)

Thus a vague and unintended "possibility" was seized upon by taxing bodies that needed revenue by unintentionally distorting this last paragraph of the court's opinion. It was considered that the Supreme Court left open the possibility that some of the income might be allocable to intrastate commerce. Scant attention has been paid to the entire opinion. *Radio does not generate energy.* It buys power and converts that power into electro-magnetic waves. It was not alleged in the *Fisher's Blend* case, as here in the case at bar (Tr. 24) that there is no such thing as "intrastate" commerce in radio; that such a term (intrastate) is a misnomer. In fact, the Supreme Court had to take judicial notice of many facts in the scant record it had before it in order to make a decision. But that decision was sufficient, as will be shown later herein.

The *Fisher's Blend* case involved a Washington State Tax of 1935 and was decided in the year 1936. The *KVL* case (Three-Judge Court at Tacoma, Washington) involved a 1934 Washington State Tax (decided 1935 and not appealed) and there was no room for doubt as to the sufficiency of the allegations in the *KVL* case. It was argued there, as now, that Congress

had foreclosed the subject matter to the states. Justice Stone, in the *Fisher* case, said, "all" radio was commerce, not stations of either "high" or "low" power, but *all.* The State of Washington, in the *KVL* case, could not, as a matter of fact or law, traverse the pleadings in such a case. As a matter of law, the Territory of Hawaii cannot do so in this case (See "Chain Broadcasting Rules decision," *National Broadcasting Company v. Federal Communications Commission* (1943) 63 S. Ct. 997, 319 U.S. 90.

Continuing with the history, as herein briefly outlined, the Federal Communications Commission in March, 1946, issued its "Blue Book" wherein the Federal Communications Commission declared its jurisdiction over the 'Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects also (See Complaint, Tr. 10). The Supreme Court held in 1940 that "financial qualifications to operate the proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 60 S. Ct. 693, 309 U.S. 470. Also, economic injury, in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24 (the Court of Appeals did not state *of what degree* and Congress only has this right) to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.(2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F.(2d) 554 (Cert. denied, 59 S. Ct. 72) where it was held to be a duty of the F.C.C. to make

a finding of adequate financial support as a basis of granting a license.

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of Radio licensees; and in spite of laws and decisions of the Federal Courts (*supra* and *post*), Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding radio was interstate commerce, was thwarted by complainants prior action of submitting to state jurisdiction and the Johnson Act (Section 1341, U. S.C.A.) from granting relief.

Mere denials by the Supreme Court of appeals from these decisions are now erroneously considered by taxing bodies as overruling the *Fisher's Blend* and the *KVL cases* (*supra*) in spite of the Supreme Court's statement in 70 S. Ct. 252, that

> "a denial of certiorari means only that fewer than four members of the Supreme Court thought that certiorari should be granted and carries no implication on the merits."

The Johnson Act (Section 1341, U.S.C.A.) which is inapplicable here, has prevented the Supreme Court from getting the proper vehicle upon which to clearly state the law and bring the *Fisher's* case up

to the consistency with which the Federal Communications Commission acts, and the Congress intended it to act. If the courts have doubt that a uniform national system of control over radio, precluding any state control whatsoever on the subject matter at all, is not the intention of Congress, then such a declaration should be made forthrightly. No tax should ever be allowed to be collected under the guise of innuendo, indirection, confusion, or misinterpretation. Such tactics only lead to legal indignity and from the foregoing historical resume, television, the new-comer, so to speak, will be longer in coming out unless these "economic aspects" are cleared up (See *Dumont v. Carroll*, 184 F.(2d) 153—Post). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen again in 1934.

Radio Communications Are All Interstate Commerce Regardless of Whether They Are Intended for Reception Beyond the State and Regardless of Any Question of Profit.

In *Whitehurst v. Grimes* (21 F.(2d) 787), the court held:

> "Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission; and interstate transmission may be seriously affected by communications

intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation."

In *United States v. American Bond and Mortgage Co., et al.* (D.C., N.D., E.D., Ill., 1929) 31 F.(2d) 448, Judge Wilkerson, in a very able opinion, said:

"It does not seem to be open to question that radio transmission and reception among the states are interstate commerce. To be sure, it is a new species of commerce. Nothing visible or tangible is transported. There is not even a wire over which 'ideas, wishes, orders, and intelligence' are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the results, but that result is the transmission of intelligence, ideas, and entertainment. It is intercourse and that intercourse is commerce. (*Gibbons v. Ogden*, 9 Wheat. 1, 68; *Pensacola Telegraph Co.*, 96 U.S. 1, 9; *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347, 357; *International Text Book Co. v. Pigg*, 217 U.S. 91, 106, 107.)"

(See also 24 Op. 100, 101; *Marconi Wireless Telegraph Company of America v. Commonwealth*, 218 Mass. 558; Minnesota Rate Case, 230 U.S. 352; *American Express Co. v. United States*, 212 U.S. 522.)

Since Radio Communication Is Interstate Commerce and It Admits of and Requires a Uniform System of Control Throughout the Nation, If Not Throughout the Entire World, This Control Is Vested Exclusively in Congress and Its Agencies to the Exclusion of the So-Called Police Power of the States.

That radio requires uniform national and international control is apparent from even a passing consideration of the art. "Radio waves know no frontiers." They have been the subject of repeated international conferences dating from 1906. A 5-kilowatt broadcasting installation anywhere in the United States or its Territories has an interference range extending beyond the borders of the country. In the frequencies above 6,000 kilocycles, transmission using less power than that of a small electric-light bulb is heard around the world. Allocation of frequency and power to stations must produce severe interference unless they are made part of a generally interrelated allocation of national scope. Where power or frequency gives a station international effect, its assignment is registered with the International Telecommunications Union at Berne (appellants frequency is registered in Switzerland—Tr. 17).

In the case of the *State Freight Tax* (15 Wall. 232, 21 L. Ed. 146) the court said:

> "* * * the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclu-

sive legislation by Congress." (Citing number of cases)

(See also *Henderson, et al. v. Mayor of New York, et al.*, 92 U.S. 259, 23 L. Ed. 543.)

In *Walling v. Michigan* (116 U.S. 446, 29 L. Ed. 691) Mr. Justice Bradley, speaking for the court, at page 455, said:

> "We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary only to refer to our previous decisions on the subject, the most important of which are collected in *Brown v. Houston* (114 U.S. 622, 631) and need not be cited here. We have also repeatedly held that *so long as Congress does not pass any law to regulate such commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammelled; and that any regulation of the subject by the states, except in matters of local concern only is repugnant to such freedom.*" (*Welton v. Missouri*, 91 U.S. 275, 282; *County of Mobile v. Kimball*, 102 U.S. 691, 697; *Brown v. Houston*, 114 U.S. 622, 631) (Emphasis ours)

There are numerous decisions of the Supreme Court holding that when the thing to be regulated admits of a uniform nation-wide system of regulation, and has been declared to be, and is, interstate commerce, and Congress enacts a law to regulate it under the commerce clause of the Federal Constitution, that

the states have no authority to enact laws which would interfere with Federal regulation. In the case of *United States v. American Bond and Mortgage Co., et al., supra,* it was said:

> "The authority of Congress extends to every instrumentality or agency by which commerce is carried on; and the full control of Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operation. The execution of Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (*Simpson, et al. v. Shepard,* 230 U.S. 352, 399, and cases cited)

When Congress enacts a law to regulate any phase of interstate commerce, such Federal law has plenary control over the subject and supersedes any state law which may be in conflict with it (*Gibbons v. Ogden,* 9 Wheaton 1, 6 L. Ed. 23).

(See *Regents of University System of Georgia v. Carroll,* 338 U.S. 586, 598-99 (1950; *National Broadcasting Co. v. United States,* 319 U.S. 190, 215-18 (1943); *Arde Bulova,* 11 F.C.C. 137, 149 (1946), aff'd. sub. nom., *Mester Bros. v. United States,* 70 F. Supp. 118 (E.D., N.Y.), aff'd 332 U.S. 749 (1947). See also, F.C.C., Public Service Responsibility of Broadcast Licensees, 9-12, 12-47, 55-56 (1946); 2 Chafee, Government and Mass Communications, 636-

42 (1947) (defending constitutionality of F.C.C. regulatory proposals).

Radio broadcasting consists of three indispensable elements, namely, (1) the transmitter, (2) the connecting medium, or the ether and (3) a receiving set. A loss of any one of the three and you have nothing. Each is indispensable to the other. Thus the transmitter (1) is so essentially a part of (2) the connecting medium or the ether and (3) the receiving set, that you could not have broadcasting without reception or the connecting medium, the ether.

The *Fisher's Blend* case (56 S. Ct. 608) has been misunderstood so many times by careless reading that it needs reaffirmation more than clarification. The court stated on page 610:

> "* * * The essential purposes and indispensable effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279, 53 S. Ct. 627, 77 L. Ed. 1166."

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5000-watt station;" the court said "*all broadcasting.*" The *Fisher's* Blend case was reaffirmed and *augmented* in

Western Livestock v. Bureau of Revenue (1938) 58 S. Ct. 546, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court in the *Western Livestock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Livestock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

> "* * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n, supra,* on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours)
>
> "Great Britain levies an annual license tax on radio receiving apparatus.
>
> "* * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented and brought the *Fisher's Blend* case into the "multiple burden" rule.

There is a noticeable absence of this case's ruling in the State Court rulings relied on by defendant (Arkansas and New Mexico decisions—*supra*). We repeat what the court said "*if broadcasting could be taxed, so also could reception.*"

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule.

In the case of *Joseph v. Carter and Weekes*, 67 S. Ct. 815, 330 U.S. 422 (1947), a gross receipts tax was declared invalid although the possibility of "multiple burden" taxation did not in fact exist as it does in this case. The tax in the *Carter-Weekes* case arose out of a local exicse tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, is a local activity of loading and unloading of ships, and the taxable event is so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appellee states that broadcasting in Hawaii is purely an intra-territorial activity and that reception is a mere incident thereto, whether far or near. This contention is made despite the fact Hawaii is encompassed by the Act (see *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a FCC license to use and oper-

ate such. The Supreme Court of the United States (1947) disagreed and held that the activity of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. So with Broadcasting, if "intelligence is broadcast, it has to be received," somewhere—far or near. The court stated:

> "* * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra,* 329 U.S. 249, 256, 67 S. Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without discrimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality

was one of the reasons for the adoption of the Commerce Clause."

And, even more clearly, a very recent United States Supreme Court decision restores with sweeping vitality the axiom that no state may tax the privilege of doing an interstate business. In *Spector Motor Co. v. O'Connor*, 71 S. Ct. 508, 340 U.S. 602 (1951) the Supreme Court invalidated the Connecticut Business Tax Act as applied to an interstate trucking concern. The local United States judge first ruled a declaration was in order despite an alleged adequate remedy in the State Courts. The Court of Appeals reversed the local court. Then the Connecticut Supreme Court ruled the tax valid. Then the United States District Court, *who had retained jurisdiction*, found against the tax. The Court of Appeals reversed the trial judge again, then the Supreme Court sustained the trial court. In this case, the taxpayer, a Missouri trucker doing a largely interstate business, attacked the validity of the Connecticut tax. The tax was on net income, and not on gross receipts, thereby making the tax, if anything less objectionable because of the commerce clause aspect. And, just as the appellant in the case at bar, the State of Connecticut relied on the "local incidents" of the interstate commerce to support the tax. The Spector Company had twenty-seven employees, a bank account, *licensed pickup trucks* and two leased terminals within the State. *It performed much business within the State.* Freight was picked up and accumulated through intrastate trips, awaiting full truckloads. But because the ultimate movement of the goods was in interstate commerce, just as the signal from a

broadcasting station is in interstate commerce and is inseparable from that commerce, the Supreme Court held the tax invalid, as an unconstitutional tax on the privilege of engaging in interstate business.

The New Mexico State Supreme Court's decision relied upon by defendant in the case at bar (*Albuquerque Broadcasting Co. v. Bureau of Revenue*, 184 P.(2d) 416) falls of its own weight when careful examination is made of that decision for the court stated::

> "* * * As we understand, it is not held in the *Fisher's Blend* case that *all* broadcasting is interstate commerce."

Thus it is seen that this New Mexico court predicated its reasoning on the ground that the *Fisher's Blend* case did not hold that *all* broadcasting was interstate commerce. The Supreme Court held that *all* broadcasting was commerce, whether five watts or five thousand watts. Neither the New Mexico nor Arkansas cases are worthy of further attention for they are wrong and, as above noted, were based on erroneous reasoning as the *Western Livestock* case, *supra*, and the explanatory remarks of Justice Stone (who wrote the decision in the *Fisher's Blend* case) were deliberately ignored.

As heretofore asserted, the Supreme Court stated that justice should be dispassionate (*supra*). It is not "dispassionate" when state courts ignore Supreme Court of the United States decisions, and Court of Appeals decisions, in order to sustain their own legislatures. The subject matter of radio broadcasting is foreclosed to concern by the states or territories. The

late case of *Dumont Lab. v. Carroll*, 86 F. Supp. 813 (District of Pa. 1949) (affirmed Circuit Court of Appeals, Pa., Sept. 1950; 184 F.(2d) 153, cert. denied by the Supreme Court), so decided.

In this case the Pennsylvania State Board of Censors required all motion picture films intended to be broadcast by television to be submitted to the board for censorship. The action was brought under the Declaratory Judgment Section of the Federal code. The state contended that Congress' denial in the Communications Act of 1934 to the Federal Communications Commission of the power of censorship manifested an intent by Congress to leave the states free to censor programs. Again, as in this case at bar, the defendant alleges Congress contemplated (Sec. 301, Title 47) that some broadcasting was "intrastate." This late case disposes of this contention.

The Pennsylvania television stations contended that the regulation was invalid because it impinged upon a field of interstate commerce which Congress had pre-empted and was inconsistent with the national policy adopted by Congress for the regulation and control of radio and television. It was alleged that it would constitute an undue and unreasonable burden on interstate commerce in radio and television broadcasting. Congress, under the authority of the Commerce Clause had fully occupied the field. The court held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the

> comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

The mere silence of Congress on state taxes on radio, as in television censorship, is a prohibition in itself. The field has been pre-empted by Congress and states cannot concern themselves with the subject matter at all. Radio regulation by Congress is *regulation*—not remedial as was the Seaman's Act.

Radio is akin, in legal analogy, to National banks. Congress took over the subject matter. 99% of a National bank's business is done in the local community, yet states cannot tax this subject matter without the consent of Congress. A national bank license is for no stated term. A radio license is good, however, for only three years and must be renewed. The personnel of a national bank, except the directors, do not have to be approved, yet a radio station is told by law *how*, *when*, *where*, and *for whom* and *how long* it may operate. Every employee operator must be licensed. All equipment and location of studios must be approved. The *extent* of the sensitivity of the regulation is the test of whether Congress pre-empted a subject matter.

The field of radio is a more sensitive form of commerce than National banks. Also, as stated in the *Western Livestock* case, a tax on broadcasting would make possible a tax on reception. Such a "possibility," even though the tax on reception does not exist, is sufficient in law (under *Carter v. Weekes, supra*) to render this tax invalid under the "multiple burden" rule.

CONCLUSION

No suit was pending in the Territory between these parties at the time this action was initiated. The defense of comity did not apply.

All of the essential elements of jurisdiction were present. The issues were plainly ones of law by virtue of both parties filing Motions for Summary Judgment. The ruling of the Supreme Court in *National Broadcasting v. U.S.*, 63 Sup. Ct. 997, 319 U.S. 190, not only made the controversy one of law, but a justiciable case because of appellants' confusion over the law in the light of prior decisions by high Federal Courts' being in conflict with high State Courts' decisions, calling for a Declaration of Rights under the Federal Declaratory Statute.

WHEREFORE, under the equitable powers of this court, the appellant prays that this court may treat this matter now as a problem of first instance. A simple declaration of the law in this case—that the Hawaiian tax law is good or bad constitutionally—

will be decisive of the entire controversy—nationally and locally—for there is a great national interest in this cause.

Respectfully submitted,

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